PAUL J. FISHMAN
United States Attorney
KRISTIN L. VASSALLO
Assistant United States Attorney
970 Broad Street, Suite 700
Newark, NJ 07102
Tel. (973) 645-2835
Fax. (973) 297-2010
email: kristin.vassallo@usdoj.gov

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LOWER PASSAIC RIVER STUDY AREA COOPERATING PARTIES GROUP, *Plaintiff,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Defendant.*	HON. JOSE L. LINARES *Civil Action No.* 15-CV-7828 (JLL) (JAD)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

PAUL J. FISHMAN
United States Attorney
970 Broad Street, Suite 700
Newark, NJ 07102

On the Brief:
KRISTIN L. VASSALLO
Assistant United States Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

This case arises out of four Freedom of Information Act ("FOIA") requests submitted by the Lower Passaic River Study Area Cooperating Parties Group ("CPG") to the U.S. Environmental Protection Agency (the "EPA") between April 21, 2014, and June 17, 2014. CPG's four requests – which included more than twenty sub-requests – broadly sought documents and information concerning the remedy selection process for the lower 8.3 miles of the Lower Passaic River, a portion of the Diamond Alkali Superfund Site.[1] In response to these requests, the EPA has produced approximately 4,361 responsive documents, withholding approximately 270 documents in part, and withholding approximately 2,312 documents in full pursuant to one or more appropriate FOIA exemptions. See Declaration of Walter Mugdan ("Mugdan Decl.") ¶¶ 77, 95, 121, 133.

Dissatisfied with the EPA's response, CPG brought this action challenging the adequacy of the EPA's search for records and its decision to invoke several FOIA exemptions to withhold or redact certain documents. The Court should grant summary judgment to the EPA and dismiss CPG's complaint, for the following reasons.

First, to the extent CPG challenges the adequacy of the EPA's search, its claim must be rejected because the search was reasonably calculated to uncover all potentially responsive documents subject to FOIA.

Second, to the extent CPG challenges the EPA's decision to withhold certain responsive documents and information, this argument is likewise meritless because the agency's invocation of FOIA exemptions was entirely appropriate. The EPA correctly asserted 5 U.S.C. § 552(b)(5)

---

[1] For ease of reference, this brief may refer to the 17-mile stretch of the Passaic River as the "Lower Passaic River" or the "17 Miles," and the lower 8.3 mile of the Lower Passaic River as the "Lower 8.3 Miles."

("Exemption 5") to withhold records and information protected by the deliberative process, attorney client, and attorney work product privileges. The EPA also appropriately withheld documents under 5 U.S.C. § 552(b)(7)(A) ("Exemption 7(A)") because disclosure of those documents could reasonably be expected to interfere with a pending law enforcement proceeding. And the EPA properly invoked 5 U.S.C. §§ 552(b)(6) ("Exemption 6") to withhold information relating to EPA employees, other federal employees, and members of the public. Because the EPA properly concluded that responsive documents fell within specific FOIA exemptions, its decision to withhold or redact these documents should be upheld.

Finally, the EPA released all reasonably segregable information following a line-by-line review of the withheld documents. For all of these reasons, the Court should grant summary judgment to the Government and dismiss the complaint.

STATEMENT OF FACTS

The EPA hereby incorporates its Statement of Material Facts Not In Dispute, and the declaration and exhibits referenced therein, which have been filed contemporaneously with this Memorandum of Law.

STANDARD FOR SUMMARY JUDGMENT IN FOIA CASES

The Freedom of Information Act, 5 U.S.C. § 552, "represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 925 (D.C. Cir. 2003). Although the statute was enacted to facilitate public access to government documents, this access is not "all encompassing." Sheet Metal Workers Int'l Assoc., Local Union No. 19 v. U.S. Dep't of Veterans Affairs, 135 F.3d 891, 897 (3d Cir. 1998) (quotation omitted). FOIA does not require an agency "to create responsive records or answer

questions posed as FOIA requests." See Stuler v. I.R.S., 216 F. App'x 240, 242 (3d Cir. 2007); Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C.Cir.2001). Likewise, an agency may withhold documents sought by a FOIA requester if they fall within one of the nine categories of information that Congress has exempted from FOIA's disclosure requirements. See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989). If the requester believes that an agency has improperly withheld documents or information, he may bring an action in federal district court seeking de novo review of the agency's decision. See 5 U.S.C. § 552(a)(4)(B); Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1049 (3d Cir. 1995).

Once filed in federal court, a FOIA case is typically resolved by a motion for summary judgment. See Manna v. U.S. Dep't of Justice, 832 F. Supp. 866, 870 (D.N.J. 1993), aff'd, 51 F.3d 1158 (3d Cir. 1995). To succeed on such a motion, an agency may submit affidavits (also known as a "Vaughn index") describing the information withheld and explaining why the information falls within one or more of FOIA's exemptions.[2] See id. at 1163; Leonard v. U.S.

---

[2] Documents may be grouped together as categories in a Vaughn Index, "particularly when the withholdings comprise multiple, duplicative records and when the government's supporting affidavits are 'sufficiently detailed to allow the district court fairly to evaluate' the application of a claimed exemption to distinct categories of documents." Citizens for Responsibility & Ethics in Wash. v. U.S. DOJ, 955 F. Supp. 2d 4, 14 (D.D.C. 2013) (citing Gallant v. NLRB, 26 F.3d 168, 173 (D.C. Cir. 1994)); see also Davin, 60 F.3d at 1051 (stating that an agency may appropriately produce a categorical Vaughn containing "specific factual information concerning the documents withheld and correlat[ing] the claimed exemptions to the withheld documents"). As the D.C. Circuit has explained, "[n]o rule of law precludes [an agency] from treating common documents commonly." Judicial Watch, Inc. v. FDA, 449 F.3d 141, 147 (D.C. Cir. 2006). Indeed, such categorical grouping may be an "efficient vehicle[] by which a court can review withholdings that implicate the same exemption for similar reasons." Id.; see CEI v. EPA, 12 F. Supp. 3d 100, 115 (D.D.C. 2014). In this case, because of the large volume of documents and in order to aid the Court with its review, the parties have agreed, in their joint discovery plan (ECF No. 11) that the EPA would provide "(1) an index that identifies each document withheld in full or in part over the four requests, along with codes for applicable FOIA exemptions; and (2)

Dep't of Treasury I.R.S., 590 F. App'x 141, 143 n.3 (3d Cir. 2014); McDonnell v. United States, 4 F.3d 1227, 1241 (3d Cir. 1993). Agency affidavits are generally "accorded a presumption of good faith which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." Venkataram v. Office of Information Policy, No. 09-6520 (JBS/AMD), 2013 WL 3871730, at *3 (D.N.J. Jul. 25, 2013) (quotation omitted), aff'd, 590 F. App'x 138 (3d Cir. 2014). "[A]n agency is entitled to summary judgment if its affidavits describe the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption[,] and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." Am. Friends Serv. Comm. v. Dep't of Defense, 831 F.2d 441, 444 (3d Cir. 1987) (internal quotation marks and citation omitted).

---

information describing the different categories of documents withheld in full or in part, and the reasons each category qualifies for withholding under the relevant FOIA exemption(s), either in a separate "index" or incorporated into the agency's declaration." Joint Discovery Plan, at 3. Accordingly, documents have been grouped into categories in the EPA's Vaughn index. See Mugdan Decl. ¶¶ 139-41; Exhibit X ("Vaughn Index"). For ease of reference, this brief will cite directly to the Vaughn Index.

ARGUMENT

THE COURT SHOULD GRANT SUMMARY JUDGMENT TO THE EPA BECAUSE THE AGENCY CONDUCTED A THOROUGH SEARCH AND PROPERLY WITHHELD INFORMATION PURSUANT TO FOIA EXEMPTIONS

In response to CPG's FOIA requests, the EPA has produced more than 4,500 documents in full or in part, only withholding documents and information that are exempt from disclosure under 5 U.S.C. §§ 552(b)(5), (b)(6), and (b)(7)(A). CPG's challenge to this response must be rejected. As set forth more fully below, the EPA conducted an appropriate search that was reasonably calculated to uncover all relevant documents. Moreover, the EPA properly asserted Exemption 5, Exemption 6, and Exemption 7(A) over responsive documents and information, and released all reasonably segregable information following a line-by-line review of the withheld documents. Because there is no dispute of fact regarding these issues, the Court should grant summary judgment to the EPA and dismiss the complaint.

A. The EPA Conducted an Adequate Search for Responsive Records

As an initial matter, to the extent CPG challenges the adequacy of the EPA's search for responsive records, this argument must be rejected because the search was reasonably calculated to uncover all relevant documents subject to FOIA.

FOIA requires agencies to conduct searches that are "reasonably calculated to uncover all relevant documents." Abdelfattah v. Dep't of Homeland Sec., 488 F.3d 178, 182 (3d Cir. 2007) (citation omitted). To determine whether an agency has conducted an appropriate search, a court does not ask "whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." Id. at 182 (quotation and emphasis omitted). Thus, "the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search."

Qatanani v. Dep't of Justice, Nos. 12-4042 (KSH) (CLW), 12-5379 (KSH)(CLW), 2015 WL 1472227, at *7 (D.N.J. Mar. 31, 2015) (quoting Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003)). At summary judgment, an agency will prevail when it offers a "reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched." Abdelfattah, 488 F.3d at 182 (citations omitted). Courts are reluctant to order an agency to conduct an expanded search "without a positive indication of overlooked materials." Qatanani, 2015 WL 1472227, at *7 (quoting Founding Church of Scientology v. Nat'l Sec. Agency, 610 F.2d 824, 837 (D.C. Cir. 1979)) (internal quotation marks omitted).

The EPA's search amply satisfies these requirements. The Declaration of Walter Mugdan, Director of the EPA's Emergency and Remedial Response Division ("ERRD") for Region 2, establishes that the EPA has made a good faith effort to conduct a search for the requested records using methods which can be reasonably expected to produce the information requested, and therefore has conducted a search of all locations that are likely to yield documents responsive to CPG's FOIA requests. As the declaration details, the EPA conducted multiple searches to ensure a complete response, while seeking to locate the specific materials requested in each of the four FOIA requests.

For CPG's first FOIA request, which sought thirteen categories of information,[3] EPA staff, with assistance from employees of the Louis Berger Group and Battelle,[4] located technical data and information in EPA's possession that were responsive to a number of sub-requests. See

[3] CPG's first FOIA request originally sought fourteen categories of documents, but sub-request #13 was withdrawn by CPG. See Mugdan Decl. ¶ 59.

[4] Louis Berger Group and Battelle were hired by the Army Corps of Engineers - Kansas City District to perform technical work on the Lower 8.3 Miles Remedial Investigation/ Focused Feasibility Study. See Mugdan Decl. ¶¶ 34-36.

Mugdan Decl. ¶¶ 63-64. In addition, EPA staff searched the email accounts of current and retired Region 2 employees (from ERRD, Office of Regional Counsel, and Office of the Regional Administrator) who were likely to have responsive emails, and searched electronic and paper records maintained by an ERRD employee. See id. ¶¶ 65-67 (describing specific parameters of the search).

For CPG's second FOIA request, which broadly sought all documents and correspondence relating to two models developed as part of the Lower 8.3 Miles Remedial Investigation/ Focused Feasibility Study ("RI/FFS"), EPA staff searched the email accounts of seven Region 2 employees from ERRD and the Office of Regional Counsel, as well as an EPA Headquarters employee located in Region 2's Edison office, who were likely to have responsive emails. See id. ¶ 85. In addition, EPA staff searched working files and notes maintained by Region 2 employees. See id. (describing specific parameters of search).

For CPG's third FOIA request, which sought seven categories of information, EPA staff searched the email accounts of fourteen Region 2 employees (from ERRD, the Public Affairs Division, Office of Regional Counsel, and the Regional Administrator's Office) who were likely to have responsive emails, and searched working files and notes maintained by Region 2 and Public Affairs Division employees. See id. ¶¶ 103, 107 (describing specific parameters of search). In addition, EPA staff informed Regional Administrator Judith Enck of sub-request #4 of CPG's third FOIA request, which sought:

> "Any and all communications regarding the Lower Passaic River Study Area between any member of the public and Judith Enck, including any alter egos or aliases of Administrator Enck. This information would include but not be limited to all letters, email (both official accounts and personal accounts used for official business), and any notes, records, reports, summaries or memoranda taken during or prepared after communications with members of the public relating to the LPRSA."

Id. ¶ 104. EPA staff explained to Ms. Enck that, while Region 2 would use EPA's eDiscovery software to search her work email account (so she would not have to do so herself), Ms. Enck would "need to search through all of the other communication methods listed above (personal emails used for official business, letters, notes, memos, etc.) for information responsive to this FOIA request (up to 5/14/14)." Id. Ms. Enck acknowledged the request to search, and all responsive materials were thereafter uploaded to FOIAonline and circulated to the staff members processing CPG's FOIA requests. See id. ¶¶ 105-06. As of May 2016, Ms. Enck has confirmed that her search included all locations reasonably likely to contain responsive information to CPG's Third Request. See id. ¶ 106. Ms. Enck has confirmed that she did not use her personal email account for communications regarding the Lower Passaic River Study Area with any members of the public. See id. Ms. Enck has confirmed that she searched her files, including paper files, notes, letters and memoranda, and her personal email account. See id.

For CPG's fourth FOIA request, which sought information relating to the New Jersey Department of Environmental Protection's ("NJDEP's") Fish Advisory Levels, EPA staff spoke with five Region 2 employees to determine who at EPA, if anyone, would potentially have responsive records. See id. ¶ 122. These individuals included a staff member from Region 2's Clean Water Division who served as the New York/New Jersey Harbor Estuary Program ("HEP") coordinator; a Clean Water Division employee responsible for reviewing the technical bases for state water quality standards; a former Clean Water Division employee who had worked on New York and Mohawk Nation (but not New Jersey) fish consumption advisories; the Clean Water Division, Water Management Branch Chief; and the ERRD risk assessor for the Diamond Alkali Superfund Site. See id. ¶¶ 122-27 (describing communications with

employees). Of these individuals, only the ERRD risk assessor located potentially responsive records – emails from NJDEP, which were released to CPG. See id. ¶ 127.

Based on the foregoing search efforts, EPA staff properly determined that all locations reasonably likely to have responsive information had been searched. See id. ¶¶ 69, 88, 110, 113, 128. In total, EPA personnel identified and reviewed more than 66,000 documents that were potentially responsive to CPG's four FOIA requests and produced more than 4,500 documents. See id. ¶¶ 56, 77, 95, 121, 133. Because the EPA "made a good faith effort to search for the records requested," and its "methods were reasonably expected to produce the information requested," Kidd v. Dep't of Justice, 362 F. Supp. 2d 291, 294 (D.D.C. 2005), the Court should reject any challenge to the agency's search, and enter summary judgment in favor of the EPA on this issue. See, e.g., N'Jai v. U.S. E.P.A., No. 13-1212, 2014 WL 2508289, at *12 (W.D. Pa. June 4, 2014) (finding EPA "declaration to be in good faith and sufficiently detailed so as to establish the EPA's compliance with its duty under FOIA to conduct an adequate search for, and to produce, records that are responsive to the Plaintiff's request").

B. The EPA Properly Withheld Documents and Information Under FOIA Exemption 5, Exemption 6, and Exemption 7(A)

In responding to CPG's FOIA requests, the EPA invoked three FOIA exemptions to withhold documents and information: Exemption 5 (in particular, the deliberative process privilege, the attorney-client privilege, and the attorney work product doctrine); Exemption 6, and Exemption 7(A). For the reasons that follow, the Court should uphold the EPA's assertion of these three exemptions in all respects.

1. The EPA Properly Withheld Documents Under Exemption 5

As the Mugdan Declaration describes, the EPA has withheld seventeen categories of information under Exemption 5:

- Category 1: Communications and documents exchanged between Region 2, EPA Headquarters, and the National Remedy Review Board ("NRRB"), including technical documentation undergoing attorney review.

- Category 2: Communications and documents exchanged among EPA Region 2 Technical Staff, EPA Region 2 Legal Staff, EPA Headquarters Technical Staff and EPA Headquarters Legal Staff related to the NRRB/CSTAG Memo and Region 2 response.

- Category 3: Communications and documents exchanged between Region 2 attorneys and EPA Headquarters attorneys, with some non-attorney staff copied, related to the Proposed Plan.

- Category 4: Communications and documents exchanged between Region 2 technical staff and EPA Headquarters technical staff that were subject to review by Region 2 attorneys and EPA Headquarters attorneys, related to the Proposed Plan and Focused Feasibility Study.

- Category 5: Communications and documents exchanged among EPA Region 2 Technical Staff, EPA Region 2 Legal Staff, EPA Headquarters Technical Staff and EPA Headquarters Legal Staff related to the Proposed Plan and Focused Feasibility Study.

- Category 6: Correspondence between Region 2 and NJDEP on NJDEP angler surveys that included sites on the Lower Passaic River, and any data and analysis from those surveys.

- Category 7: Email Communications between EPA Region 2 attorneys with attorney comments on draft technical documents.

- Category 8: Communications and attachments circulated between EPA and Partner Agencies related to the development of the Lower Passaic River CSM and EMBM and Proposed Plan for the Lower 8.3 Miles of the Lower Passaic River, including documents and communications shared under a Joint Prosecution and Confidentiality Agreement.

- Category 9: Communications and attachments circulated between EPA, EPA's technical contractors, and Partner Agencies related to the development of the CSM and EMBM for the Lower Passaic River and Proposed Plan.

- Category 10: Communications and documents circulated internally among EPA Region 2 staff as part of the development of the CSM and EMBM for the Lower Passaic River and Proposed Plan.

- Category 11: Communications and draft documents, particularly drafts of technical documents and related communications and comments, circulated between EPA Region 2 and its contractors and subcontractors as part of the development and peer review of the CSM and EMBM for the Lower Passaic River and Proposed Plan.

- Category 12: Communications and draft documents, particularly drafts of technical documents and related communications and comments, circulated between technical staff in EPA Region 2 and technical staff in EPA Headquarters.

- Category 13: Draft technical documents circulated for legal review, incorporating attorney comments.

- Category 14: Communications between Region 2 technical staff and Region 2 attorneys to discuss attorney comments and review of technical documents.

- Category 15: Hardcopy notes and documents related to the development of the CSM and EMBM for the Lower Passaic River and Proposed Plan, including meeting notes and notes and comments on draft documents.

- Category 16 – Handwritten Attorney Notes from Meetings and Calls.

- Category 18 – One document consisting of comments from two Partner Agencies, U.S. Fish and Wildlife Service ("USFWS") and National Oceanographic and Atmospheric Administration ("NOAA") to the NRBB on the Lower 8.3 Miles Focused Feasibility Study.

See Mugdan Decl. ¶¶ 138-40; Vaughn Index, Categories 1-16, 18.

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). To qualify for protection under Exemption 5, a document must (1) originate with a government agency; and (2) fall within one of the privileges that would apply in civil litigation. See Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001). Exemption 5 thus "encompasses the traditional discovery privileges," including the deliberative

process privilege, the attorney client privilege, and the attorney work product privilege. Abdelfattah, 488 F.3d at 183; Qatanani, 2015 WL 1472227, at *7. As explained more fully below, the EPA has met each of these elements with respect to the withheld documents.

a. Documents Withheld Under Exemption 5 Qualify As Inter-agency or Intra-Agency Communications

As noted above, documents withheld under Exemption 5 must originate with a government agency. See Klamath, 532 U.S. at 8. For the purposes of FOIA, "agency" is defined as "each authority of the Government of the United States [and] includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . , or any independent regulatory agency[.]," Id. at 9 (citing 5 U.S.C. §§ 551(1), 552(f)(1)) (internal quotation marks omitted). Thus, documents authored by employees of the EPA and other federal agencies – like the Army Corps of Engineers, NOAA, and USFWS – easily satisfy Exemption 5's threshold requirement.

As for documents created by non-agency personnel, like consultants hired by the Army Corps of Engineers, and employees from state agencies like NJDEP and NJDOT, documents created by these entities likewise qualify as "inter-agency" or "intra-agency" communications. Under the "consultant corollary" to Exemption 5, courts have interpreted the phrase "intra-agency" to include "records authored by non-agency entities if those records were solicited by a U.S. agency in the course of its deliberative process." Pub. Employees for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico, 740 F.3d 195, 201-02 (D.C. Cir. 2014). So long as a consultant does not represent an interest that is "'necessarily adverse' to the government," materials originating with that individual or organization will satisfy the "intra-

agency" element of Exemption 5. See Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 892 F. Supp. 2d 28, 46 (D.D.C. 2012) (quoting Klamath, 532 U.S. at 14).

In this case, the EPA properly asserted Exemption 5 over documents created by non-agency personnel. See Vaughn Index, Categories 6, 8, 9, and 11. The EPA works closely with a group of federal and state agencies (known as the "Partner Agencies") to investigate and remediate the Lower Passaic River. See Mugdan Decl. ¶¶ 31-32. The Partner Agencies include the Army Corps of Engineers- New York District, NOAA, and USFWS, as well as NJDOT (which participated in these efforts until November 2007), and NJDEP (which assumed NJDOT's responsibilities). See id. ¶ 31. The EPA has a particularly close relationship with NJDEP for the investigation and cleanup of the Diamond Alkali Superfund Site, including the Lower Passaic River, because the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and its implementing regulations provide for state involvement in the CERCLA process. See id. ¶ 32 (citing 42 U.S.C. § 9621(f) and 40 CFR 300.515(f)).

In 2005, the EPA signed a Joint Prosecution and Confidentiality Agreement ("JPCA") with the Partner Agencies with respect to the Lower Passaic River. See id. ¶ 33. This JPCA provided that the parties' common interests with respect to the Passaic River Matter (defined as the contamination of the Passaic River and environs in New Jersey) include the determination, implementation, and supervision of appropriate and effective environmental and natural resource damages response actions, and the preparation for and prosecution of anticipated enforcement litigation against third parties with respect to the Passaic River Matter. See id. The JPCA further provides that for the parties to pursue and achieve their common interests concerning environmental and natural resource damages response actions and anticipated enforcement litigation with respect to the Passaic River Matter, it has been and remains imperative, and in

some instances is mandated by federal law, that the State of New Jersey and federal parties exchange communications, information and documents as part of their deliberative and decision-making processes. See id. Subsequently, and throughout development of the 17-Miles RI/FS and the Lower 8.3 Miles RI/FFS, EPA has shared technical documents in draft form with the Partner Agencies, including NJDEP and NJDOT. See id.

Given the close working relationship between the New Jersey agencies and the federal Partner Agencies, and in particular the agencies' shared interest in enforcing the cleanup of the Lower Passaic River, the EPA properly concluded that documents created by NJDEP and NJDOT personnel meet the threshold requirement for Exemption 5 protection. See Citizens for Pennsylvania's Future v. Department of the Interior, 218 F.R.D. 441, 446 (M.D. Pa. 2003) (withholding under Exemption 5 documents exchanged between the Department of the Interior and a Pennsylvania agency in an environmental proceeding because the agencies were "pursu[ing] common objectives" and "share[d] a unity of interest"); vacated on other grounds, 2004 WL 5462212 (M.D. Pa. Aug. 23, 2004); Gen. Elec. Co. v. U.S. E.P.A., 18 F. Supp. 2d 138, 142-43 (D. Mass. 1998) (considering documents between EPA and state agencies involved in CERCLA matter "intra-agency" records under Exemption 5); Chemcentral/Grand Rapids Corp. v. U.S. E.P.A., No. 91 C 4380, 1992 WL 724965, at *12-13 (N.D. Ill. Aug. 20, 1992), report and recommendation adopted, No. 91 C 4380, 1992 WL 281322 (N.D. Ill. Oct. 6, 1992) (considering documents between EPA and Michigan Department of Natural Resources exchanged during CERCLA matter "intra-agency" records under Exemption 5).

The same is true with respect to documents created by contractors retained by the federal government. As mentioned supra at note 4, pursuant to an Interagency Agreement, the Army Corps of Engineers – Kansas City District ("Corps-KC") hired contractors Malcolm Pirnie (later

Louis Berger Group), HydroQual (later HDR/HydroQual), and Battelle to perform sampling, analysis, and technical work, which was provided to the Corps-KC and the EPA for further review, approval, and incorporation into the eventual Lower 8.3 Miles RI/FFS, Proposed Plan (including the Conceptual Site Model and Empirical Mass Balance Model), and Record of Decision. See Mugdan Decl. ¶¶ 34-40. The Corps-KC also used these and other contractors to perform technical work that was incorporated into the EPA's oversight of CPG's 17 Miles RI/FFS. See id. ¶¶ 38-40. In performing this work, the government's contractors do not represent or advocate for any outside interests, but rather perform work and create documents "for the purpose of aiding the [EPA]'s deliberative process." Pub. Citizen, Inc. v. Dep't of Justice, 111 F.3d 168, 170 (D.C. Cir. 1997) (citation omitted). Under the well-recognized "consultant corollary" to Exemption 5, documents created by these contractors qualify as "intra-agency" communications under Exemption 5. See Elec. Privacy Info. Ctr., 892 F. Supp. 2d at 45 (communications between DHS and "outside consultants" who contracted with DHS qualified as "intra-agency"); Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Sec., 514 F. Supp. 2d 36, 44 (D.D.C. 2007) (documents drafted by FEMA contractors qualified as "intra-agency").

b. Documents Withheld Under Exemption 5 Fall Within Privileges Recognized in Civil Discovery

The EPA properly asserted Exemption 5 over seventeen categories of documents because each category is protected from disclosure under the deliberative process privilege, the attorney client privilege, and/or the attorney work product doctrine. Each of these privileges is discussed below.

i. Deliberative Process Privilege

Designed to protect the quality of agency decision-making, see NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149, 151 (1975), the deliberative process privilege "recognizes that[, if] agencies [were] forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." Redland Soccer Club, Inc. v. Dep't of Army of U.S., 55 F.3d 827, 854 (3d Cir. 1995) (quoting First Eastern Corp. v. Mainwaring, 21 F.3d 465, 468 (D.C. Cir. 1994) (quotation marks omitted)). As the Supreme Court has explained, "[t]he deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." Klamath, 532 U.S. at 8-9 (citation omitted). In addition to promoting open communication, the privilege also serves to "prevent premature disclosure of policies before final adoption, and to avoid public confusion if grounds for policies that were not part of the final adopted agency policy happened to be exposed to the public." Ctr. For Medicare Advocacy, Inc. v. U.S. Dep't of Health & Human Servs., 577 F. Supp. 2d 221, 234 (D.D.C. 2008).

An agency may rely on the deliberative process to withhold information under Exemption 5 if the information is both "predecisional" and "deliberative." Abdelfattah, 488 F.3d at 183. "A document is predecisional if it was drafted to aid a decision maker in reaching his or her decision, and it is deliberative if it reflects the give[]-and-take of the consultative process." Qatanani, 2015 WL 1472227, at *8 (quoting Petroleum Info. Corp. v. U.S. Dep't of Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992)) (internal quotation marks omitted). The deliberative process privilege thus protects "recommendations, draft documents, proposals, suggestions, and other

subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Cleveland v. United States, 128 F. Supp. 3d 284, 299 (D.D.C. 2015) (quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (quotation marks omitted). Courts should accord "considerable deference to an agency's judgment as to what constitutes part of the agency give-and-take – of the deliberative process[.]" Gosen v. U.S. Citizenship & Immigration Servs., 118 F. Supp. 3d 232, 244 (D.D.C. 2015) (internal quotation marks and citation omitted); Chemical Mfrs. Ass'n v. Consumer Product Safety Comm'n, 600 F. Supp. 114, 118 (D.D.C. 1984) (noting that agency is "better situated" than FOIA requester or the Court "to know what confidentiality is needed" to protect agency's deliberative process).

The EPA has asserted Exemption 5 with respect to sixteen categories of documents containing information protected by the deliberative process privilege. See Vaughn Index, Categories 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, and 18. These categories generally fall into the following groups: (1) draft materials, including multiple drafts of technical materials developed to support the EPA's Proposed Plan, which are subject to extensive review; (2) emails containing deliberative communications, between EPA staff, EPA partners, and EPA contractors; and (3) other deliberative documents, such as hard-copy notes of meetings and comments from partner agencies. As more fully explained in the Mugdan Declaration and the Vaughn Index, these documents contain both pre-decisional and deliberative information. Accordingly, the EPA properly asserted Exemption 5 based on the deliberative process privilege.

A. Draft materials

"[D]raft documents, by their very nature, are typically predecisional and deliberative." Techserve All. v. Napolitano, 803 F. Supp. 2d 16, 27 (D.D.C. 2011) (quotation omitted). This is because drafts are "recommendatory in nature" and "reflect[] the give-and-take of the

consultative process." Coastal States Gas Corp., 617 F.2d at 866. Drafts are also pre-decisional if they "reflect the personal opinions of the writer rather than the policy of the agency." Id. Accordingly, courts routinely uphold the application of the deliberative process privilege to draft documents. See, e.g., Abdelfattah, 488 F.3d at 183; Competitive Enter. Inst. v. Office of Sci. & Tech. Policy, No. 14-CV-01806 (APM), _ F. Supp. 3d _, 2016 WL 544463, at *6 (D.D.C. Feb. 10, 2016) (citing cases).

Here, the EPA withheld draft documents in many of the sixteen categories, including (1) draft technical documents prepared by EPA Region 2 or the National Remedy Review Board for internal review and comment (Category 1); (2) drafts of the NRRB's Memorandum co-authored with the Contaminated Sediments Technical Advisory Group ("CSTAG"), and Region 2's Response to the NRRB/CSTAG Memorandum (Categories 1 and 2); (3) drafts of the Proposed Plan and FFS for the Lower 8.3 Miles (Categories 3, 4, and 5); (4) drafts of documents addressing technical analyses of fish and crab consumption rates (Category 6); (5) draft appendices, analyses, portions of, and other technical documents relating to, the Conceptual Site Model ("CSM") and Empirical Mass Balance Model ("EMBM"), which were developed as part of the Lower 8.3 Miles FFS (Categories 7, 8, and 9); (6) draft tables, figures, and other technical documentation generated as part of the development of the CSM and EMBM for the Lower Passaic River and Proposed Plan (Categories 10 and 11); and (7) draft tables, figures, appendices, and other technical documentation prepared for internal review by EPA Region 2 attorneys and EPA Headquarters staff in the Office of Solid Waste and Emergency Management (Categories 12 and 13).

The EPA properly withheld these draft materials because they were pre-decisional and deliberative. During the development of the Lower 8.3 Miles RI/FFS and the Proposed Plan, the

EPA exchanged drafts of technical materials and other documents with Partner Agencies, contractors, Region 2 technical staff and attorneys, EPA Headquarters technical staff and attorneys, and two EPA-internal advisory groups, the NRRB and the CSTAG. See Mugdan Decl. ¶¶ 33-54. These materials were circulated in order to obtain input and comment prior to the finalization of documents that were ultimately made public, including the NRBB/CSTAG Memorandum, the EPA's Response to the NRBB/CSTAG Memorandum, the Lower 8.3 Miles RI/FFS, the Proposed Plan, and the Record of Decision. See, e.g., id. ¶¶ 49-50. The drafts are pre-decisional because they both pre-dated, and aided in the development of, the final documents, which are publicly available and were part of the administrative record. Moreover, the drafts are deliberative because they contain edits and comments regarding their contents and because they reflect the thoughts of EPA staff, and partners (i.e., contractors and employees of partner agencies). Disclosure of these drafts would have a chilling effect on the EPA's ability to obtain candid feedback from employees and partners, receive highly technical advice and support, and engage in frank, internal discussions about proposed agency actions in development. It would also undermine the development of agency action that relies upon the thoughts and opinions of employees and partners as they review documents. Finally, release of this information could cause public confusion by disclosing reasons or rationales for agency actions that were not in fact the final reason for the actions.

For all of these reasons, as well as the reasons more fully set forth in the Mugdan Declaration and the Vaughn Index, the EPA has properly asserted Exemption 5 over draft documents. See, e.g., Odland v. Fed. Energy Regulatory Comm'n, 34 F. Supp. 3d 3, 19 (D.D.C. 2014 (drafts of environmental assessment and agency order protected by deliberative process

privilege under Exemption 5); Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 928 F. Supp. 2d 139, 153 (D.D.C. 2013) (draft memoranda and technical documents).

B. Emails containing deliberative communications

The EPA has asserted Exemption 5 to protect emails containing deliberative communications relating to a number of matters. These matters are more fully described in the Vaughn Index, but include discussions of the following: (1) the draft documents discussed above; (2) Region 2's basis for and selection of the preferred alternative that would be included in the Proposed Plan and the Lower 8.3 Miles Focused Feasibility Study (Categories 1-5, 18); (3) calculation of fish and crab consumption rates for the Lower Passaic River based on NJDEP angler surveys (Category 6); (4) proposed changes to the CSM and the effects on the Proposed Plan (Category 7); (5) development of the CSM, the EMBM, and the Proposed Plan (Categories 8-15); and (6) the process for reviewing and finalizing the CSM, EMBM, and Proposed Plan with contractors (Category 11).

The EPA properly withheld these communications because they were pre-decisional and deliberative. As noted above and in the supporting declaration and Vaughn Index, the EPA has engaged in extensive internal deliberations regarding the Lower 8.3 Miles RI/FFS, the CSM and EMBM, and the Proposed Plan, actively soliciting advice and input from employees, attorneys, contractors, and partner agencies as these documents and the underlying technical materials were developed. The withheld communications qualify as pre-decisional because they were prepared for the purpose of assisting EPA decision-making before the final documents were issued. They include analysis, opinions, and recommendations from both attorneys and non-attorneys related to the development of these final documents and underlying data. The communications qualify as deliberative because they contain the candid views of individual employees and partners on

the matters in development, reflected in the edits and comments to draft documents and in the back-and-forth discussions of these issues. The deliberative communications do not represent an official agency decision or policy but instead reflect comments, opinions, and views of options in development and documentation prepared to support the EPA's proposed actions. Release of these communications would impair the EPA's ability to have frank discussions among partners, contractors and staff (including frank discussions with agency attorneys and internal review bodies like the NRBB) about proposed agency actions and documents in development. It would also impair the EPA's ability to receive highly technical advice and support. Finally, disclosure of these communications could create public confusion by revealing reasons or rationales for agency actions that were not in fact the final reason for the actions.

For all of these reasons, as well as the reasons more fully set forth in the Mugdan Declaration and the Vaughn Index, the EPA has properly asserted Exemption 5 over deliberative communications. See, e.g., Envtl. Integrity Project v. Small Bus. Admin., 125 F. Supp. 3d 173, 177 (D.D.C. 2015) (upholding asserting of deliberative process privilege over deliberative communications containing comments, requests for clarification, draft calculations, analysis, and suggestions for improving the draft regulations); Shurtleff v. U.S. Envtl. Prot. Agency, 991 F. Supp. 2d 1, 13 (D.D.C. 2013) (email deliberations and draft comments to reports); Am. Petroleum Inst. v. U.S. E.P.A., 846 F. Supp. 83, 89 (D.D.C. 1994) (documents containing recommendations and opinions on policy or legal matters implicated by study).

C. Other deliberative documents

The EPA has also withheld other internal documents containing deliberative communications, including notes of meetings and written comments on draft documents

(Category 15). These documents qualify as deliberative because they contain the thoughts and opinions of EPA staff, which were noted as part of the overall process of evaluating technical models, reviewing draft documents, and providing opinions and thoughts on options in development. The documents qualify as pre-decisional because they precede issuance of the final documents, including the Proposed Plan, and were created to aid in the development of those final documents. Further, they do not represent an official agency decision or policy. Release of these materials would have a chilling effect on staff members' ability to take candid and thoughtful notes during meetings and on draft documents, undermine the development of agency action that relies upon the thoughts and opinions of staff members, and create public confusion by disclosing reasons or rationales for agency actions that were not in fact the final reason for the action.

For all of these reasons, as well as the reasons more fully set forth in the Mugdan Declaration and the Vaughn Index, the EPA has properly asserted Exemption 5 over these documents.

ii. Attorney-Client Privilege

The attorney-client privilege "protects communications between attorneys and clients." In re Teleglobe Comm'ns Corp., 493 F.3d 345, 359 (3d Cir. 2007). The privilege applies to any "(1) communications (2) between privileged persons (3) made in confidence (4) for the purpose of obtaining or providing legal counsel." See id. "'Privileged persons' include the client, the attorney(s), and any of their agents that help facilitate attorney-client communications or the legal representation." Id. The privilege does not merely protect facts divulged by a client to the attorney; it also "encompasses any opinions given by an attorney to his client based on, and thus reflecting, those facts as well as communications between attorneys that reflect client-supplied

information." Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec., 384 F. Supp. 2d 100, 114 (D.D.C. 2005). The purpose of the attorney-client privilege is "'to assure that a client's confidences to his or her attorney will be protected, and therefore encourage clients to be as open and honest as possible with attorneys.'" Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec., 736 F. Supp. 2d 202, 209 (D.D.C. 2010) (quoting Coastal States Gas Corp., 617 F.2d at 862). Thus, unlike the work-product doctrine (discussed below), the attorney client privilege applies outside the context of litigation. See Elec. Privacy Info. Ctr., 384 F. Supp. 2d at 114.

A government agency, like a private party, "needs . . . assurance of confidentiality so it will not be deterred from full and frank communications with its counselors." In re Lindsey, 148 F.3d 1100, 1105 (D.C. Cir. 1998). Accordingly, "[u]nless applicable law provides otherwise, the Government may invoke the attorney-client privilege . . . to protect confidential communications between Government officials and Government attorneys." United States v. Jicarilla Apache Nation, 564 U.S. 162, 170 (2011). Id. at 70. Within the agency context, the attorney-client privilege shields "counseling[] intended to assist the agency in protecting its interests," as well as "legal advice and recommendations regarding agency action." Am. Immigration Council v. Dep't of Homeland Sec., 21 F. Supp. 3d 60, 79, 80 (D.D.C. 2014) (quotation marks and citation omitted). Likewise, the privilege "applies to confidential communications made to an attorney by both high-level agency personnel and lower-echelon employees." Judicial Watch v. Dep't of the Army, 466 F. Supp. 2d 112, 121 (D.D.C. 2006); see also Judicial Watch, Inc. v. U.S. Dep't of Treasury, 802 F. Supp. 2d 185, 203-04 (D.D.C. 2011).

The EPA asserted the attorney-client privilege over documents in thirteen categories. These documents are more fully described in the Vaughn Index, but include the following: (1) documents incorporating advice from EPA attorneys to program staff and managers concerning

the interpretation of CERCLA and its implementing regulations and guidance (Category 1); (2) emails between EPA attorneys and non-attorney staff regarding legal advice and statutory and regulatory interpretations/explanations, including plans for future EPA communications with CPG attorneys (Category 2); (3) communications containing attorney views on potential legal and litigation risks presented by the Proposed Plan (Category 3); (4) emails and drafts of technical documents seeking comments and advice from EPA attorneys (Categories 4, 5, and 6); (5) advice and discussions of EPA attorneys on a proposed agency action, prepared in the course of legal review of draft documents (Category 7); (6) advice of EPA attorneys to EPA staff and employees of Partner Agencies regarding the legal impact of various decisions and issues (Category 8); (8) incorporation of comments made by EPA legal staff following legal review, regarding the legal impact of various proposals and issues (Categories 9, 10, 11, 13, and 14); and (9) attorney advisory comments and questions on technical material (Categories 9, 10, 11, 13, and 14).

. The documents withheld under the attorney-client privilege contained confidential communications exchanged among EPA staff and legal counsel, as well as documents reflecting legal advice. EPA staff work very closely with EPA attorneys as they develop the documents that will form the basis for remedy selection under CERCLA. See Mugdan Decl. ¶ 142. EPA attorneys provide legal advice to program staff and managers concerning the interpretation of CERCLA and its implementing regulations and guidance. See id. They also advise EPA staff on recent changes to the law and the preparation of internal deliberative materials, such as draft documents and communications regarding those draft documents. See id. EPA attorneys also frequently review and comment on draft documents to ensure that all appropriate legal issues have been considered in the staff's analyses. See id. All of these analyses require the selection

and assessment of specific facts and data and are based on the mental impressions of EPA attorneys and EPA staff working at these attorneys' direction. See id. These attorneys direct program staff to consider various factors to assist in refining their analysis, given these attorneys' understanding of CERCLA, the National Contingency Plan (CERCLA's implementing regulations), and current case law. See id. Disclosure of these communications would deprive EPA staff, and the agency in general, of the benefit of confidential advice from EPA attorneys when developing a Proposed Plan, including guidance on the legal and regulatory adequacy of proposed remedies, as well as the development of a Feasibility Study and related agency guidance. Disclosure would also prevent EPA attorneys from advising non-legal EPA staff and contractors on technical work that is relevant to the EPA's legal enforcement activities under CERCLA.

For all of these reasons, as well as the reasons more fully set forth in the Mugdan Declaration and the Vaughn Index, the EPA has properly asserted Exemption 5 over attorney-client privileged documents. See Odland, 34 F. Supp. 3d at 19 (emails containing legal advice from agency attorneys and facts divulged by staff seeking advice protected properly withheld under attorney-client privilege); Rollins v. U.S. Dep't of State, 70 F. Supp. 3d 546, 552 (D.D.C. 2014) (emails providing legal advice from agency attorneys about agency's authority).

iii. Attorney Work Product Privilege

The attorney work-product privilege protects "the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation." Qatanani, 2015 WL 1472227, at *10 (quoting Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991)); Judicial Watch, Inc. v. Dep't of Justice, 432 F.3d 366, 369 (D.C. Cir. 2005) (doctrine shields materials "prepared in anticipation of litigation or for trial by or for another party or by or

for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent") (citation omitted). The purpose of the work product doctrine is to "shelter[] the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." In re Grand Jury (Impounded), 138 F.3d 978, 981 (3d Cir. 1998) (quotation marks and citation omitted). "The privilege thus promotes the adversarial system by protecting the confidential nature of materials prepared by attorneys in anticipation of litigation and enables attorneys to prepare cases without fear that their work product will be used against their clients." Id. (quotation marks, brackets, and citation omitted).

The work product doctrine "should be interpreted broadly," Judicial Watch, Inc., 432 F.3d at 369, and "encompass[es] documents prepared for litigation that is 'foreseeable,' if not necessarily imminent." Am. Immigration Council, 21 F. Supp. 3d at 78; see also Media Research Ctr. v. DOJ, 818 F. Supp. 2d 131, 141 (D.D.C. 2011) (concluding that "when government attorneys act as 'legal advisors' to an agency considering litigation that may arise from challenge to a government program, a specific claim is not required to justify the assertion of [the attorney work-product] privilege"). Courts have recognized that the work product privilege protects all parts of a document prepared in anticipation of litigation, not just the portions containing opinions and legal theories. See Tax Analysts v. I.R.S., 117 F.3d 607, 620 (D.C. Cir. 1997), Berger v. I.R.S., 487 F. Supp. 2d 482, 500 (D.N.J. 2007) (citing cases), aff'd, 288 F. App'x 829 (3d Cir. 2008). Thus, agencies do not have an obligation to segregate and release factual material when withholding information under Exemption 5 based on the attorney work product privilege. See Judicial Watch, Inc., 432 F.3d at 366; Qatanani, 2015 WL 1472227, at *10.

The EPA asserted the attorney work product doctrine over documents in thirteen categories. These documents are more fully described in the Vaughn Index, but include many of the same emails, drafts, and other records withheld under the attorney client privilege (Categories 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 13, and 14), as well as handwritten notes from EPA attorneys containing the attorneys' opinions, evaluations, and next steps for follow up from those meeting (Category 16). Documents withheld under the attorney work product doctrine were created by EPA attorneys or at the direction of EPA attorneys in reasonable anticipation of litigation. In particular, given the significant costs associated with the anticipated clean-up of the Lower Passaic River, EPA has anticipated that some or all of the responsible parties would seek to challenge the remedy in federal court after the EPA issued its Record of Decision for the Lower 8.3 Miles. See Mugdan Decl. ¶ 143. In fact, NJDEP commenced litigation with responsible parties in 2005 related to the contamination of the Lower Passaic River and Newark Bay. See id. Thus, EPA has carefully prepared its reports and record with an eye toward potential litigation, under the direction and supervision of EPA attorneys. See id. For instance, EPA attorneys have been deeply involved in commenting on and recommending changes to EPA staff's technical analyses, to ensure that the materials would be legally sufficient to withstand any challenge. Many of the withheld materials may be used to support the EPA's enforcement against responsible parties, including the decision of whether to issue a notice letter to a party advising it of its legal responsibility for the site, and the decision to issue an order to one or more parties and/or to prepare a referral to the Department of Justice to file a complaint. Release of the confidential information contained in such documents would allow external scrutiny of EPA's sensitive litigation preparations and deprive EPA attorneys of the ability to keep their thoughts and mental impressions from being discovered by an opponent in litigation.

For all of these reasons, as well as the reasons more fully set forth in the Mugdan Declaration and the Vaughn Index, the EPA has properly asserted Exemption 5 over these documents protected by the attorney work product doctrine. See, e.g., Shurtleff, 991 F. Supp. 2d at 18 (upholding EPA's invocation of work product doctrine; attorney's edits to agency response was "the type of document that clearly anticipates legal challenges to the Agency's finding and seeks to pre-emptively defend against them by crafting the strongest possible counter arguments").

2. The EPA Properly Withheld Information Under Exemption 6

In responding to CPG's FOIA requests, the EPA relied upon Exemption 6 to redact personally-identifying information of EPA employees, other federal employees, and members of the public, as well as emails containing medical information and other personal details. See Mugdan Decl. ¶¶ 146-47. The agency's invocation of Exemption 6 should be upheld in all respects.

FOIA Exemption 6 allows federal agencies to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). As courts have recognized, the purpose of Exemption 6 is "to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 599 (1982). To determine whether information falls within this exception, a court must weigh "the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." U.S. Dep't of State v. Ray, 502 U.S. 164, 175 (1991) (citation and quotation marks omitted). Courts interpreting Exemption 6 have construed the provision broadly, holding that its protections extend to "all records that can be identified as applying to [a particular]

individual" – not merely "those files that contain intimate details or highly personal information." Berger, 288 F. App'x at 832.

Courts have taken a similarly expansive view of the interests protected by Exemption 6, recognizing that individuals have a substantial interest in keeping their personal information protected from public disclosure. See, e.g., U.S. Dep't of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 500-501 (1994); Sheet Metal Workers, 135 F.3d at 899-901. This interest extends to federal employees, see Smith v. Dep't of Labor, 798 F. Supp. 2d 274, 284-85 (D.D.C. 2011); people employed by federal contractors, see Sheet Metal Workers, 135 F.3d at 899-901; and individuals who are simply mentioned in federal records, see Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 782 (E.D. Pa. 2008). The fact that a FOIA requestor might be able to figure out the identity of an individual whose name has been redacted under Exemption 6 "does not diminish [the individual's] privacy interests in not having the documents disclosed." Taylor v. Dep't of Justice, 268 F. Supp. 2d 34, 38 (D.D.C. 2003) (citation omitted).

With respect to federal employees, "[c]ourts generally recognize the sensitivity of information contained in personnel-related files and have accorded protection to the personal details of a federal employee's service." Smith, 798 F. Supp. 2d at 284-85. Accordingly, courts have consistently approved the withholding of employee names and personally identifiable information like home addresses and telephone numbers. See Lewis v. U.S. EPA, 2006 WL 3227787, at *5-6 (E.D. Pa. Nov. 3, 2006) (citing cases).

In contrast to the expansive privacy interests protected by Exemption 6, the public interest implicated by the provision is much more limited. The Supreme Court has held that there is only one public interest that may be considered in this analysis – "the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to

public understanding of the operations or activities of the government." U.S. Dep't of Defense, 510 U.S. at 495 (internal quotation marks, citation, and brackets omitted). Other reasons for seeking the information – such as obtaining information that would aid a private lawsuit – simply do not qualify as a public interest that can prohibit withholding information under the exemption. See Horowitz v. Peace Corps, 428 F.3d 271, 278-79 (D.C. Cir. 2005); Lakin Law Firm, P.C. v. Fed. Trade Comm'n, 352 F.3d 1122, 1122-23 (7th Cir. 2003); Roberts v. U.S. Dep't of Health and Human Services, No. Civ. A. 88-2041, 1988 WL 94289, at *1 (E.D. Pa. Sept. 9, 1988). In weighing these competing principles, courts must remember that disclosure under FOIA is not limited to the specific requester who has a particular interest in the information. Because all members of the public have the same access to information under FOIA, information released to one requester will be available to all members of the public who request it, irrespective of their intentions. See Sheet Metal Workers, 135 F.3d at 905 (citing cases).

Applying these principles here, the documents and information withheld by the EPA pursuant to 5 U.S.C. § 552(b)(6) plainly fall within this exemption. The EPA invoked Exemption 6 to withhold home addresses, personal email addresses, home and cell phone numbers, and similar contact information for EPA employees, other federal employees, and members of the public. See Mugdan Decl. ¶ 146. The EPA also invoked the exemption to redact emails containing medical and other personal information, such as discussions of doctor's appointments, child care, vacations, and other uses of personal time or leave. See id. ¶ 147.

The information withheld by the EPA under Exemption 6 qualifies as "personnel . . . or similar files" within the meaning of the statute, because personal contact information and discussions of medical or personal issues can clearly "be identified as applying to [particular] individual[s]." Berger, 288 F. App'x at 832 (quoting U.S. Dep't of State, 456 U.S. at 600.

Further, release of this information would impact a very strong privacy interest. Home addresses, home cell phone numbers, personal email addresses, and other identifying data are precisely the type of information that is protected by Exemption 6. See, e.g., Sheet Metal Workers, 135 F.3d at 904-905; Lewis, 2006 WL 3227787, at *4. Likewise, details of an individual's medical or personal appointment certainly involve a privacy interest, as do codes for participating in conference calls that employees believe will be restricted only to the participants. See, e.g., PacifiCorp v. U.S. Environmental Protection Agency, No. 13-cv-02187-RM-CBS, 2014 WL 87509, at *5 (D. Colo. Jan. 8, 2014) (conference call codes); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 177 (D.D.C. 2004) (personal appointments). In short, each of the types of information withheld under § 552(b)(6) implicates a substantial privacy interest.

By contrast, disclosure of the information withheld under Exemption 6 would not serve the only public interest relevant for purposes of Exemption 6: gaining an understanding of agency operations. See U.S. Dep't of Defense, 510 U.S. at 495. The personal contact information of federal employees, contractors, and members of the public does not shed any light on how the EPA conducts its enforcement practices or otherwise provide an understanding of the agency's operations. Nor do email discussions of medical appointments or similar personal matters.

Although there is no public interest in releasing the redacted information, disclosure would pose substantial risks to the affected individuals. Public release of an individual's address, email, telephone number, or other contact information presents a risk of unwanted contact and identity theft. Further, release of information relating to medical appointments and other personal matters would expose very private details to the public, which may cause

embarrassment to the individuals whose information has been exposed. Finally, release of the conference call codes would violate the privacy rights of EPA employees, who have a legitimate expectation that their code will not be released to the public and that members of the public will not listen to their conference calls.

In the end, the balancing contest is not a close one. Disclosure of the information withheld under Exemption 6 would violate the expectations and privacy interests of EPA employees and other individuals. Disclosure would not, however, do anything to serve the only public interest that matters for Exemption 6: improving public understanding of agency operations. Given all of these circumstances, the EPA properly concluded that disclosure of the redacted information would constitute a clearly unwarranted invasion of personal privacy. See Berger, 288 F. App'x at 832 (time records of IRS employee properly withheld under Exemption 6 because disclosure served no general public interest, "only . . . appellants' narrow interest in knowing how she investigated their particular case"); PacifiCorp, 2014 WL 87509, at *5; Cozen O'Connor, 570 F. Supp. 2d at 782 (names and identifying information of "persons incidentally mentioned" in agency records, including employees, properly withheld under Exemption 6); Lewis, 2006 WL 3227787, at *4 (addresses, telephone numbers, and other information about employees properly withheld under Exemption 6). The Court should therefore uphold the EPA's determinations and dismiss the complaint.

3. The EPA Properly Withheld Documents and Information Under Exemption 7(A)

In responding to CPG's FOIA requests, the EPA concluded that a number of documents withheld under Exemption 5 also qualified as law enforcement records that must be withheld in full under Exemption 7(A) because their disclosure "could reasonably be expected to interfere

with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). See Vaughn Index, Categories 8, 9, 10, 11, 12, 15, and 18. The Court should also uphold this determination.

Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes" where disclosure would result in one of six enumerated harms. See 5 U.S.C. § 552(b)(7)(A)-(F). To qualify for withholding under any subsection of Exemption 7, records must first satisfy a threshold requirement: that they are "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). An agency seeking to apply Exemption 7 "does not have to identify a particular individual or incident as the object of an investigation into a potential violation of law or security risk." Abdelfattah, 488 F.3d at 185. Rather, the agency must only show "that the relationship between its authority to enforce a statute or regulation and the activity giving rise to the requested documents is based upon information sufficient to support at least a colorable claim of the relationship's rationality." Id. at 186. "'[L]aw enforcement purposes' under Exemption 7 includes both civil and criminal matters within its scope. . . . FOIA makes no distinction between agencies whose principal function is criminal law enforcement and agencies with both law enforcement and administrative functions." Tax Analysts v. IRS, 294 F.3d 71, 77 (D.C. Cir. 2002); see also Kleinert v. Bureau of Land Mgmt., 132 F. Supp. 3d 79, 91 (D.D.C. 2015) (noting that "files relating to civil or administrative enforcement proceedings" can qualify for Exemption 7 protection).

Here, the records withheld by the EPA were compiled pursuant to the EPA's statutory authority under CERCLA, as part of the agency's efforts to enforce that statute with respect to the 17 Miles and the Lower 8.3 Miles. See Mugdan Decl. ¶ 144. Thus, these records were compiled "for law enforcement purposes." See Ameren Missouri v. U.S. E.P.A., 897 F. Supp. 2d 802, 813 (E.D. Mo. 2012) (records compiled by EPA as part of its "permitting, enforcement,

and compliance activities under the Clean Air Act," were compiled for law enforcement purposes under Exemption 7); Envtl. Prot. Servs., Inc. v. U.S. E.P.A., 364 F. Supp. 2d 575, 588 (N.D.W. Va. 2005) (records compiled by EPA to enforce Toxic Substances Control Act were compiled for law enforcement purposes under Exemption 7); Finkel v. U.S. Dep't of Labor, No. 05-5525 (MLC), 2007 WL 1963163, at *10 (D.N.J. June 29, 2007) (records compiled by OSHA acting pursuant to its statutory authority were compiled for law enforcement purposes under Exemption 7). Accordingly, the EPA properly concluded that the records meet the Exemption 7 threshold.

Once an agency satisfies this threshold, it must then show that the records at issue qualify for protection under one of six subsections. Exemption 7(A) – the subsection relevant to this case – exempts from disclosure documents that "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). "The principal purpose of Exemption 7(A) is to prevent disclosures which might prematurely reveal the government's cases in court, its evidence and strategies, or the nature, scope, direction, and focus of its investigations, and thereby enable suspects to establish defenses or fraudulent alibis or to destroy or alter evidence." Maydak v. U.S. Dep't of Justice, 218 F.3d 760, 762 (D.C. Cir. 2000) (citations omitted). Congress enacted Exemption 7(A) because it "recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their cases" in court. NLRB v. Robbins Tire & Rubber Corp., 437 U.S. 214, 224 (1978). The exemption must therefore be construed pragmatically, so as to ensure that the statutory protection of law enforcement records is given "meaningful reach and application." John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989).

To qualify for Exemption 7(A), the agency must show that "(1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm." Manna, 51 F.3d at 1164. Exemption 7(A) broadly applies to pending or prospective proceedings, including ongoing criminal, civil, and administrative investigations. Id. at 1165. Similarly, the phrase "articulable harm" covers a wide array of interference, from the possibility of witness intimidation and evidence tampering, Am. Civil Liberties Union of New Jersey v. Dep't of Justice, No. 11-2553 (ES), 2012 WL 4660515, at *8 (D.N.J. Oct. 2, 2012), aff'd, 733 F.3d 526 (3d Cir. 2013), to giving a requester "advance access to the government's case," or allowing a "suspected violator" to "construct defenses which would permit violations to go unremedied." Robbins Tire & Rubber Company, 437 U.S. at 236-37, 240-241; see also Barney v. I.R.S., 618 F.2d 1268, 1273 (8th Cir. 1980); Cotten, Day & Doyle v. Dep't of Energy, No. 80-2707, 1981 WL 1279, at *3 (D.D.C. July 16, 1981). An agency may consider the requester's identity when determining whether the release of the information could reasonably be expected to interfere with enforcement proceedings. See Manna, 51 F.3d at 1164-1165.

In this case, the EPA has determined that disclosing certain documents responsive to CPG's requests could reasonably be expected to harm prospective enforcement proceedings relating to the Lower Passaic River, including potential litigation that the EPA may need to take to bring about the cleanup of the 17 Miles and/or the Lower 8.3 Miles. See Mugdan Decl. ¶ 144. Civil and administrative proceedings under environmental statutes qualify as "enforcement proceedings" under Exemption 7(A). See Ameren Missouri, 897 F. Supp. 2d at 810-11 (E.D. Mo. 2012) ("Pending administrative and civil actions under the CAA for penalties and injunctive relief such as those at issue here are deemed "enforcement proceedings" within the ambit of

Exemption 7(A)"); Envtl. Prot. Servs., 364 F. Supp. 2d at 588 (EPA enforcement action qualified as enforcement proceeding under Exemption 7(A)); Gen. Elec. Co., 18 F. Supp. 2d at 143 (enforcement proceedings under CERCLA qualified as "enforcement proceedings" under Exemption 7(A)). Moreover, the fact that enforcement proceedings have not yet commenced does not alter this conclusion; given the long history of litigation involving the Lower Passaic River the EPA has properly concluded that enforcement proceedings are reasonably anticipated. See Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1114 (D.C. Cir. 2007) (clarifying that "[t]he enforcement proceedings need not be currently ongoing; it suffices for them to be 'reasonably anticipated'"); Goodrich Corp. v. U.S. E.P.A., 593 F. Supp. 2d 184, 193 (D.D.C. 2009) (likelihood of CERCLA enforcement proceedings was "sufficiently great" to meet Exemption 7(A) requirements); Gen. Elec. Co., 18 F. Supp. 2d at 144 (Exemption 7 properly applied where EPA had "reasonable expectation that [CERCLA] enforcement actions . . . will ultimately ensue").

In addition, the EPA has provided a detailed explanation of the harms that would result from disclosure of the documents in question. The EPA has explained that release of these documents would hinder the government's ability to control or shape enforcement action should such an action become necessary to bring about the cleanup selected for the Lower 8.3 Miles or and/or 17 Miles of the Lower Passaic River, and would prematurely reveal the government's evidence or strategy in an enforcement case. See Mugdan Decl. ¶ 145. These harms are especially significant given the identity of the party requesting these documents: a group that includes some of the parties that EPA has identified as potentially responsible for the Lower Passaic River part of the Diamond Alkali site. See id. In particular, the EPA has identified three specific ways in which release of the information could interfere with prospective enforcement

actions: (1) it would allow CPG, other potentially responsible parties ("PRPs"), and/or other members of the public to pry into the agency's thoughts and mental impressions about the enforcement case; (2) it would give these parties insight into the facts EPA thought were significant (or insignificant) and the judgments EPA staff applied to reach their conclusions, allowing CPG (and potentially other PRPs) to gain valuable internal and privileged information for use in their defense should EPA pursue an enforcement action; and (3) it would give CPG and other PRPs the ability to peer into EPA's assessment of the strengths and weaknesses of its preliminary determinations with respect to the remedy selection process, and thus its internal assessment of its litigation risk, knowledge that could allow CPG or other PRPs to attempt to evade or interfere with EPA's law enforcement function by providing undue insight into non-public information about how the agency's staff and attorneys interpret and enforce the law. See id. In sum, the premature release of this information through FOIA would provide CPG and other interested parties with undue insight into EPA's investigation of the Lower 8.3 Miles and the development of the enforcement case, which in turn could enable CPG and other PRPs to devise litigation and/or enforcement avoidance strategies to counter EPA's enforcement effort and impair EPA's ability to ultimately present its case. See id.

Given the harms articulated above, the EPA properly asserted Exemption 7(A) over these documents. See Robbins Tire & Rubber Company, 437 U.S. at 236-37, 240-241 (recognizing that giving requester "advance access to the government's case," or allowing a "suspected violator" to "construct defenses which would permit violations to go unremedied" as harms under Exemption 7(A)); Barney, 618 F.2d at 1273 (holding that "prematurely revealing the Government's case" and disclosing the scope or direction of government investigation would interfere with enforcement proceedings); Envtl. Prot. Servs., 364 F. Supp. 2d at 588 (upholding

assertion of Exemption 7(A) where disclosure "would prematurely reveal the EPA's case against the plaintiff in the administrative proceeding that is currently pending"); Int'l Collision Specialists, Inc. v. I.R.S., No. 93-2500 (DRD), 1994 WL 395310, at *5 (D.N.J. Mar. 4, 1994) (Exemption 7(A) properly invoked over documents containing IRS agent's analysis and opinions concerning investigation because "[r]eleasing such information would likely suggest to plaintiff the direction of potential investigation to be followed"); Cotten, Day & Doyle, No. 80-2707, 1981 WL 1279, at *3 (D.D.C. July 16, 1981) ("Release of the disputed documents in this case would necessarily allow plaintiffs earlier and greater access to agency investigatory records than they would otherwise have, and, as discussed above, would interfere with such proceedings by prematurely revealing the government's case.").

C. The EPA Produced All Reasonably Segregable Information to CPG

The EPA released all reasonably segregable, non-exempt information that was responsive to CPG's FOIA requests. FOIA requires that, if a record contains information that is exempt from disclosure, any "reasonably segregable" information must be disclosed after deletion of the exempt information unless the non-exempt portions are "inextricably intertwined with exempt portions." 5 U.S.C. § 552(b); Mead Data Ctr. v. U.S. Dep't of Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977); Cozen O'Connor, 570 F. Supp. 2d at 772; Kurdyukov v. U.S. Coast Guard, 578 F. Supp. 2d 114, 128 (D.D.C. 2008). However, this provision does not require disclosure of records in which the non-exempt information that remains is meaningless. See Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005) (concluding that no reasonably segregable information exists because "the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words").

Consistent with this obligation, EPA Region 2 staff conducted a line-by-line review of responsive documents for segregability of non-exempt material, determining that where a record was withheld in full, no meaningful portion could reasonably be released; performing redactions where non-exempt material could be reasonably segregated; and releasing non-exempt portions of those records. See Mugdan Decl. ¶¶ 73, 91, 112, 136. In addition, once this suit was commenced, the EPA's Office of General Counsel re-reviewed the withheld documents for segregability and to ensure that all non-exempt information had been released. See id. ¶¶ 72, 90, 112. As a result of this review, on May 11, 2016, 102 documents that were previously withheld in full in response to CPG's FOIA requests were released in full and 91 documents were released with redactions. See id. ¶¶ 72, 90.

EPA has thus produced all non-exempt, "reasonably segregable portion[s]" of the responsive records. 5 U.S.C. § 552(b).

CONCLUSION

For all of the foregoing reasons, the Court should grant summary judgment to the EPA and dismiss the complaint in all respects.

Dated: Newark, New Jersey
May 13, 2016

PAUL J. FISHMAN
United States Attorney

By: *s/Kristin L. Vassallo*
Assistant United States Attorney